No. 2504

United States Circuit Court of Appeals

for the Ninth Circuit

C. A. Smith Lumber & Manufacturing Company, a corporation,
Plaintiff in Error.

vs.

John A. Parker,
Defendant in Error.

Reply Brief of Plaintiff in Error

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Indulging in the familiar artifice of befogging the issue, counsel for defendant in error states in his brief (p. 17) that we have misconceived the basis of the action; and that this action is upon an executed parol agreement.

The issues in this case are not complex or intricate. They are so absurdly simple that we sincerely believe the court need look no further than the pleadings to find reversible error.

The complaint alleged (Tr. p. 7, par. 6) that the defendant made and entered into an agreement with the plaintiff

> "by the terms of which the plaintiff signed a release in writing, (set forth in full and made a part of the complaint by stipulation (Tr. p. 27) * * * the defendant then and there * * * agreeing orally * * * as a further consideration for such a release to give him employment so long as he wanted it."

The complaint specifically declared upon a writing and an additional parol agreement which contradicted the terms of the writing, and not upon an executed parol agreement as now asserted.

To the issue thus squarely tendered a demurrer was interposed and overruled and this we insist constituted reversible error. The cases we have cited in our main brief are controlling authorities and squarely in point on this question, and this issue cannot be obscured by the cloud of ink which counsel, with cuttlefish cunning, seeks to envelop it. Pages of his brief are devoted to quotations from the testimony. We say the testimony was not admissible and should not be in the record.

Even at the trial counsel for Parker by a series of leading questions was careful to accentuate the fact that the parol agreement and the writing were contemporaneous and parts of the same transaction.

> "Q. And what statement if any did they make to you **at the time this release was signed** about giving you a job and what kind of a job?
> A. Said would always give me a job

and something better than common work.

Q. That was part of the whole settlement?

A. Yes sir." (Tr. p. 110-111.)

"Q. I thought I had asked you the question as to how long, if at all, they told you this job would last; **when they made this settlement?**

A. Told me it would last as long as I wanted the job.

Q. Now that I understand was **a part of the promises upon which you made the settlement?"**

A. Yes sir." (Tr. p. 116.)

Without in the least desiring to discredit counsel's remarkable agility, we call the court's attention to p. 117 of the transcript:

"Mr. Smith * * * for this release of $400.00 **we say there was an additional consideration for the release** * * * "

Parker's testimony is conclusive that the alleged agreement to furnish employment was a **contemporaneous agreement** and not an executed parol agreement standing alone.

"Court: What did Mareen say at the time you signed that written agreement about your work?

A. Well, at the time I signed the agreement, he promised to keep me employed." (Tr. pp. 131-132.) * * * *

"Q. And you understood that as soon as you got over the appendicitis you could go back to work, didn't you?
A. Yes sir, hadn't settled with them at the time I got appendicitis.
Q. You hadn't settled with them?
A. Hadn't settled. We had talked over, but we had never settled anything.
Q. Oh. When you got this final settlement, I am trying to get at just what was said when you signed these papers. That was the time you settled when you signed these papers?
A. **That was the final settlement.**"
(Tr. pp. 132-133.)

The issue, then, was purely and simply whether the written release of compromise and settlement could be contradicted by parol evidence of a contemporaneous agreement. In his complaint and at the trial that was the theory of counsel for defendant in error, but now in an effort to side-step the effect of the decisions we have cited he claims an entirely different theory (p. 33 of his brief) namely, that his action is upon an executed oral agreement, and states that:

> "With this explanation of the theory of this case presented to the trial court, it will be found that the plaintiff in error has not cited a single case in point."

We respectfully insist that our cases are squarely in point and controlling and that the court from a

mere inspection of the complaint and demurrer will find reversible error. The true issue is further disclosed by the opinion on demurrer of the court below (Tr. pp. 30-31) and the authorities there referred to, all of which we have discussed in our main brief. A mere reading of this opinion will disclose that counsel's present theory of an antecedent, separate, executed parol agreement is an afterthought and was not advanced in the court below.

Throughout his brief, in his argument and in his attempt to distinguish the cases cited in the brief of plaintiff in error, counsel for defendant in error relies on this new theory of an executed parol agreement which he claims was made in May or June, 1909. By so doing he contradicts his own witness and client (Parker) who emphatically and repeatedly testifies that he did not make any agreement or settlement until the release was signed. He testifies that he went to work in May, 1909 (Tr. p. 107) that there was some conversation concerning settlement, but he was asked by his counsel if he accepted and he replied:

> "A. No, I didn't accept it at that time, so I said I would think it over and see * * * " (Tr. p. 108).

According to his testimony he continued working and there were further negotiations concerning doctor's bills and medicines, and he worked about a month.

> "I worked about a month or a little over and took appendicitis. I was laid up some little while. At that time I

had no—**I didn't have a** settlement."
Q. That was before the settlement?
A. That was before the settlement, **we had talked the thing up before that but we hadn't settled** so I didn't go to their doctor again. I went to another hospital and had an operation for appendicitis, **and was laid up probably three months** * * * " (Tr. p. 109).

He went to work in May and worked a month, that is until some time in June, then he was laid up for three months, which would be in September, before he had any agreement or settlement. How can his counsel, in the face of this testimony, brought out by himself, now claim that there was an **"executed oral agreement"** in May or June? Indeed, to clinch the matter and leave no doubt in the minds of the jury as to the time when the agreement or settlement was made he was asked:

"Q. Now, let's come back to the actual date of this settlement. You say that was after you had been operated on for appendicitis?
A. Yes sir." (Tr. p. 109).

Having carefully led his witness through all the negotiations and transactions leading up to the settlement and signing of the release, which Parker himself says was in September (Tr. p. 110) he asked him repeatedly about the "ultimate promises," and the "final settlement as to employment" (Tr. p. 110) and then was careful to ask him:

"Q. That was part of the whole settlement?

A. Yes sir." (Tr. p. 111.)

There was but one settlement, and but one agreement. Parker's testimony is absolute that there was no contract, executed or otherwise, prior to the final settlement in September.

The alleged promise to furnish employment was contemporaneous with and directly contradicts the written release.

This brings us to an examination of the authorities cited by defendant in error, which we will consider in the order in which they are cited on pages 9 and 10 of his brief.

Holmboe vs. Morgan, 69 Ore. 395, 138 Pac. 1084.

We can not believe that counsel is serious in arguing that this case, or any other, holds that the rule against varying writings by parol applies only to contracts which the Statute of Frauds requires to be in writing. The rule applies to all public or official records, documents, or proceedings, and to all private writings, including contracts of all kinds, regardless of the statute of frauds. Even a mere receipt, if it also embodies the elements of a contract, is, so far as it expresses the contract, subject to the same rule as other contracts and is not open to contradictions by parol.

17 Cyc. 632, citing cases from practically all the states.

Among the cases cited is one in which the opinion was written by Hon. Robert S. Bean who wrote the

opinion on demurrer in the court below, then Chief Justice of the Oregon Supreme Court. The facts were that a receipt in the following form had been given:

> "Portland, Ore., March 30, 1898.
> "Received of Peter Covacevich warranty deed to lot of 50x100 feet on Division and Thirty-second Streets, the said conveyance being in full payment of all labor and services rendered by me for the said Covacevich, with the understanding that I am to receive an additional one hundred dollars when the remainder of the four (4) acre tract owned by the said Covacevich on Division Street is sold.
> (Signed) Mark Milos."

Milos, who signed the receipt, brought an action, claiming an oral agreement to deliver a fishing net, deed him certain real property, etc. The court held that the alleged oral agreement was void because of the statute of frauds. It will be noted that there is nothing in the receipt above quoted which the statute of frauds requires to be in writing, but the court held its terms could not be contradicted by parol. In conclusion the court said:

> "A mere receipt is always open to explanation, and may be varied by parol, because it is simply an admission or declaration in writing; but where it also embodies the elements of a contract, the latter is subject to the same

rules as any other contract: 19 Am. & Eng. Ency. Law (1 ed.), 1123, and notes: Conant v. Kimball's Estate, 95 Wis., 550 (70 N. W. 74); Jackson v. Ely, 57 Ohio St. 450 (49 N. E. 792); James v. Bligh, 11 Allen, 4; Egleston v. Knickerbacker, 6 Barb. 458; Coon v. Knap, 8 N. Y. 402 (59 Am. Dec. 502); Goodwin v. Goodwin, 59 N. H. 548. By the writing in question, binding on the plaintiff by his signature and on the defendant by its acceptance, it is, in effect, agreed that the execution and delivery of the deed and the subsequent payment of the $100 is a full satisfaction and discharge of the defendant's indebtedness. To permit the plaintiff to show by parol that he was to receive the fishing net in addition to the items specified in the writing would, it seems to us, clearly be permission to add to or vary the writing, and therefore incompetent. From these views it follows that, if the case is to be considered independently of the writing, on the theory that it was not intended to express the terms of the contract, the plaintiff must fail because of the statute of frauds. If, on the other hand, the writing is to be deemed

> evidence of the contract for one purpose, it must be for all, and he must fail because of the incompetency of evidence to vary or contradict the writing.
>
> In either view, the judgment must be reversed, and it is so ordered."
>
> Milos v. Covacevich, 40 Ore. 239 at 241.

Concerning receipts amounting to accord and satisfaction Cyc has the following:

> "When the receipt contains anything in the nature of an agreement upon the compromise or settlement of disputed claims or unliquidated damages that one party shall accept and receive from the other a certain sum of money or certain property in satisfaction and discharge, the paper signed is a contract and must be treated as such, and in the absence of fraud or mistake can not be varied or contradicted by parol."
>
> 17 Cyc 634, and cases cited.

The general rule as to parol or extrinsic evidence affecting writings is stated in Cyc at page 567, Vol. 17, where it is said that the rule applies to any contract. At page 569 it is stated:

> "It has been asserted that the rule is one of evidence merely, and does not depend upon the doctrine of estoppel at law, **nor upon the statute of frauds,** * * * "

In support of this text the case of Reid v. Diamond Plate Glass Co., 85 Fed. 193, is cited. This case was decided by the United States Circuit Court of Appeals for the Sixth Circuit. The decision said in part:

> "**Apart from any particular question of the statute of frauds,** there is an ancient rule of evidence, of wide application, resting upon substantially the same principle as the statute of frauds, which does not permit parol testimony to be recieved to contradict, vary, add to, or subtract from the terms of a valid written instrument. 2 Jones Ev. 437, 438, 446; 1 Greenl. Ev. Sec. 275; 2 Tayl. Ev., Secs. 1132, 1133."
>
> Reed v. Diamond Plate Glass Co., 85 Fed. 193 at 195.

Of course, where a contract is partly written and partly oral, the oral part may be proven, provided that part is not required by the statute of frauds to be in writing. This is all that was said or meant by the Court in the case of Holmboe v. Morgan.

But where the contract is in writing and not ambiguous, whether within or without the statute of frauds, it is presumed to be the entire contract; it is presumed that there is no oral portion and therefore the statute of frauds has no application.

Pennsylvania Co. v. Dolan, 32 N. E. 802.

This case has been fully discussed in our main brief. It was not decided by a court of last resort,

is peculiar to Indiana, and is distinguished from the case at bar by reason of the fact that here this agreement expressly provided that the consideration was the **sole consideration.**

Cox v. B. & O. S-W. R. Co. 50 L. R. A. N. S. 453.

This case holds only that a contract to give employment may be by parol; is not within the statute of frauds and is not against public policy. The decision has no bearing on the question at issue here.

Barghoorn v. Moore, 57 Pac. 265.

Involved a contract not reduced to writing, in which a receipt and certain notes were given. Fraud was pleaded. Held that the receipt could be explained by parol. The receipt was in no sense a release. There is nothing in the case which is applicable to the case at bar.

White v. Merrill, 32 Ill, 511.

Involved a mere receipt. The true rule in Illinois, where a release is involved, is stated in Clark v. Mallory, (Ill.) 56 N. E. 1099.

Allen v. Tacoma Mill Co. 51 Pac. 372.

This case is distinguished in our main brief at p. 38. It is based upon a Massachusetts case where a mere receipt was involved and **mistake** was pleaded.

Rader v. McElvaine, 21 Ore. 56.

Holds that a mere receipt is only prima facie evidence of the matters therein stated. No question of a release or written agreement involved.

Looney v. Rankin, 15 Ore. 617.

So far as this case is in point, it supports our contention. It holds that a written contract can not be varied by parol except in case of ambiguity, omissions, mistake and the like. There is absolutely nothing in the decision which supports the position of defendant in error.

Lewis v. 1st Nat'l Bank, 46 Ore. 182.

Holds that it may be shown by parol that at the time a warehouse receipt was pledged to secure a loan a certain oral agreement was made; and recognizes the general parol evidence rule.

Morse v. Rice, 36 Neb. 212; 54 N. W. 308.

Holds that a written receipt may be explained or contradicted by parol testimony, but where it embodies a contract it can not be contradicted, but is conclusive upon the parties in the absence of fraud or mistake.

Warner v. T. & P. R. Co., 164 U. S. 416.

Holds that a verbal coutract to build and maintain a switch is not within the statute of frauds. There is nething in the decision even remotely in point as applicable to the case at bar.

Hobbs v. Brush Elec. Co. (Mich.) 42 N. W. 965.

The rule as to varying written contracts by parol is not discussed or even mentioned in this case. Plaintiff, an employe, had been injured; the employer had voluntarily paid his hospital bills and wages while disabled; he had signed a release, in which, apparently, the consideration was not stated; suit

was brought for damages for the injuries, alleging an oral agreement to furnish employment. The release was attacked **for total want of consideration.** The court held that **"the rule created by statute** that sealed instruments may be impeached for want of consideration applied to the release in question; that the agreement to furnish employment was legal and binding and if not complied with the plaintiff might in another action sue on that agreement; that in order to obtain employment he had executed the release. Unlike the case at bar, there was no consideration for the release except the promise to furnish employment. On the ground **of total failure of consideration under the statute, the court** said the release might be impeached. In conclusion, the court said:

> "The settlement appears to have been satisfactory to both parties, and nothing is shown to impeach its validity."

The judgment of the lower court directing a verdict for the defendant was affirmed.

If there was no consideration stated in the release, naturally it would not be contradicted by showing what the consideration was. In the case at bar the amount stated was agreed to be the sole consideration.

Fire Insurance Co. v. Wickham, 141 U. S. 564.

This decision recognizes the rule for which we are here contending, and there is nothing therein to support the position taken by defendant in error. All

that was held was that concerning the **receipts** there considered.

1. Parol evidence was admissible to explain the receipt;

2. The paper so signed by the parties **was not in the nature of a contract.**

The receipt in full was for a fire loss and was for one half the amount actually ascertained as the amount of the loss. The court found that there was no consideration for the release of the whole amount, but also distinguished such a case from one where the settlement was a compromise of unascertained or unliquidated sums. On page 581 the court says:

> "There is no doubt that when a receipt **also embodies a contract** the rule applicable to contracts obtains, and parol evidence is inadmissable to vary or contradict it."

The court further recognizes the general rule at p. 576, and refers to Seitz v. Brewers Refrigerating Co. appearing at p. 510 of the same volume (141 U. S.) a case decided at the same term by the Supreme Court, where it is said: (Syllabus)

> "When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object, or extent of the engagement, it is, (in the absence of fraud, accident or mistake) conclusively to be presumed that the whole en-

> gagement of the parties and the extent and manner of their understanding were reduced to writing."

This case of Fire Association v. Wickham is spoken of and distinguished by the Circuit Court of Appeals in The Cayuga, 59 Fed. 483, at 486, a case squarely in point and cited at pages 31 and 32 of our main brief, as follows:

> "We have not overlooked the case of Association v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, where the effect of a receipt and release somewhat similar to the instrument in the present case was considered. But there the release was construed to have reference to the provision in the policy for terminating it at any time, and the policy had not yet expired. Besides it was held that there was no consideration for the release, if that were construed as a surrender of the claim upon which that suit were brought. No doubt, if there were any mistake in the agreement, it might be reformed upon proper proceedings for that purpose; but, so far as appears, no complaint that this instrument was not what was intended was ever made or suggested until its effect was brought into controversy in the present case."

Pierce v. Tennessee Coal, Iron & Ry. Co. 173 U. S. 1.

In this case the decision turned wholly upon a construction of a written agreement. The question of varying a written contract by parol was not raised or passed upon.

Hobbs v. Brush Elec. Co. 42 N. W. 965, and Pennsylvania Co. v. Dolan, 51 Am. State, 289.

These cases are again cited at p. 10 of the brief of defendant in error. They have already been discussed. The next case cited is that of

Gourley vs. West Chicago St. R. Co. 96 Ill. App. 68.

In this case the consideration named in the release was $1. It was held that such a release standing alone and unexplained was a complete bar to an action for injuries, and the Court also passed on the question of what proof was necessary to show **fraud.**

Smith v. St. Paul & D. R. Co. 60 Minn. 330, 62 N. W. 392.

In this case the parol evidence rule was not even mentioned. A release was given in consideration of a promise of employment and the court held this promise was a sufficient consideration for the release. No such question is at issue here.

Boggs v. Pacific Steam Laundry Co. 171 Mo. 282, 70 S. W. 818.

Just why counsel should cite this case is hard to understand. We are more than willing to concede all that is held in the opinion. The plaintiff had a

claim for personal injuries against the defendant, executed a written release, in which the defendant agreed to employ him **as long as it saw fit.** It will be noted that the agreement to employ was in writing. The plaintiff did not at the time deliver the written release but went to work on an alleged oral agreement on the part of the defendant to employ him for life.

Plaintiff afterward delivered the written release, continued in defendant's employ until discharged and then brought suit on the alleged oral agreement. The court held that as the written release was not complete until delivery, it was subsequent to the oral agreement and superseded it, **and that plaintiff had no rights under the oral agreement.** The case is so strongly against the defendant in error, even as applied to his new theory on appeal, of an executed parol agreement, that we quote in part from the opinion:

> "The case stated and proved for the plaintiff is an oral agreement made before the written agreement was entered into. It is clearly, then, such a case as Greenleaf on Evidence, in the section quoted, treats of. It is "oral testimony of a previous colloquium between the parties," or oral testimony "of conversations or declarations at the time it was completed," which is rejected because "it would tend in many instances to substitute a new and different con-

tract for the one which was really agreed upon." Such matters are rejected because "it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." The case made is not one where the agreement was verbal and entire, and only a part was reduced to writing, nor where the oral agreement relates to an independent collateral contemporaneous matter, nor where a complete contract in writing is afterwards abrogated by a subsequent parol agreement. For the petition distinctly charges that the oral agreement was made before the written agreement became complete by delivery, and the evidence is to the same effect. The written and oral agreements are so repugnant that they cannot stand together. Inasmuch as the plaintiff's case is that the written agreement was made (that is, became complete by delivery) after the oral agreement was made, the written agreement abrogates the prior oral agreement. The case would have been different if it had been charged and proved that the written agreement was completely entered into, but was afterwards changed by the oral agreement.

That would have made a case for the plaintiff to go to the jury on. But as it is, the petition stated no case, and the testimony made out none. **The fact that such testimony was admitted without objection is of no consequence, for its legal effect after it was admitted was a question of law for the court, and not a question of fact for the jury.** It showed an oral agreement to employ the plaintiff for life, and a later, subsequent written agreement to employ the plaintiff, not for life, but for only such a time as it might please the defendant to retain him. He was employed from April 9, 1889, to August 7, 1897. It was therefore the duty of the court to determine the legal effect of the subsequent written agreement upon the prior oral agreement. There was no fact for the jury to find. The demurrer to the evidence properly raised this question of law, as a demurrer to the petition would have done. The trial court erred, therefore in refusing to give the peremptory instruction at the close of the plaintiff's case, and that court acted properly when it granted a new trial for that reason, inter alia."

Boggs v. Pacific Steam Laundry Co.,
70 S. W. 818 at 821.

Forbs v. St. Louis, etc. R. Co. 167 Mo. App. 661, 82 S. W. 562.

In this case the written release is set forth in full, and was given "for and in consideration of the re-employment of said F. M. Forbes by said railway company." Plaintiff afterward sued for injuries and the trial court directed a verdict for defendant. On appeal the court held that the agreement to re-employ constituted a good consideration for the release; that the release "confronts plaintiff as an impassable barrier to the maintenance of this action," and sustained the court below in directing a verdict for the defendant. Just how this decision supports defendant in error in the case at bar is difficult to discern.

Usher v. N. Y. Cent. etc. R. Co. 76 N. Y. App. Div. 42; Affirmed Without Opinion in 179 N. Y. 544.

A release was given in consideration of a promise to employ plaintiff for life at half the salary he had previously earned. It was held that the contract was not invalid as unreasonable. The case is not in point.

East Line Ry. Co. v. Scott, 72 Texas 70; 10 S. W. 99.

This case is not in point. The court held that an oral contract to employ might be shown as part of a compromise settlement, although in fulfillment of the compromise a judgment had been entered **which did not embody or mention the parol agreement.**

The court said:

> "The agreement of the parties for compromise was oral, and the judgment rendered does not undertake to embody it, nor does it even recite that it was rendered in accordance with an agreement."

Midland R. Co. vs. Sullivan, 20 Tex. Civ., App. 50; 48 S. W. 598.

The parol evidence rule was not considered or discussed. All that was held was that an agreement to reemploy is a sufficient consideration for a release for injuries.

Carroll v Missouri R. Co. 30 Tex. Civ. App. 1; 69 S. W. 1004.

Here again there was no question of contradicting a written contract by parol. The consideration **stated in the release** was an agreement to give employment "for such time only as may be satisfactory to said company." The action was for damages for the injuries and the appellate court sustained the trial court's action in instructing a verdict for defendant, holding that although the agreement to give employment for an indefinite time was no consideration for the release, yet the employment given after the release was under the contract evidenced thereby, and was a sufficient consideration for the release.

Rhoades v. Chesapeake R. Co., 49 W. Va., 495; 39 S. E. 209.

In this case also, the agreement to furnish em-

ployment was a part of the written release and not contained in an alleged contemporaneous agreement which contradicted the writing. There is nothing in the decision which is applicable to the case at bar.

We have now discussed and carefully and fairly stated the effect of every case cited by counsel in support of the propositions advanced on pages 9 and 10 of his brief, namely, that

> "Parol evidence thereof was admissible" (p. 9) and
>
> "And in the following state decisions, cases of like import have been sustained whenever and wherever presented" (p. 10).

Not a single case is in point, except Pennsylvania Co. vs. Dolan, and that case, as stated in our main brief, stands alone, is peculiar to Indiana, was not decided by a court of last resort, and is distinguished from the case at bar by the fact that here there is an additional agreement as to the consideration named being the sole consideration.

None of the cases cited are discussed in the brief. The argument in the brief consists principally of extracts from the testimony tending to prove that there was an oral contract to employ, wholly disregarding our contention **that such testimony was not admissible.**

Each case cited in our main brief is disposed of by counsel for defendant in error by the brief assertion that it is not in point, that the facts are differ-

ent or that there was no "executed parol contract," and on page 41 of his brief counsel again states that his complaint is "framed upon the theory of the executed parol contract which was executed prior to the signing of the document. As before pointed out this is an obvious attempt to side-step the chief issue here for the reason that the complaint (par. 6, Tr. p. 7) expressly declares upon

> "**an agreement** * * * **by the terms of which the plaintiff** signed a release in writing * * * and agreeing orally" etc.

Again, Parker's testimony is conclusive that there was but one contract and one settlement and that was at the time the release was signed in September.

On page 41 of his brief counsel again states

> "But Parker was given employment in June, 1909, and the contract there became binding."

Does the fact that Parker was given employment constitute a contract?

What did Parker do or give at that time as a consideration for this "executed parol contract" to employ him? The true facts are that the employer did all in its power to help Parker, gave him employment, paid his doctor bills, his hospital bills, etc. What injury had Parker received? He scraped the skin from his leg, and continued with his work (Tr. p. 118). He had blood poisoning in his **hand**, not in his injured leg. He had appendicitis and attributed all these misfortunes to the employer and

claimed a liability. But this question of liability was never determined, his damages were never fixed and determined. On the contrary they were unliquidated and the employer in good faith gave him employment as soon as he was able to work, paid his bills, and endeavored to and did compromise the whole matter. Surely this is not a case to shock the conscience of the court, even if it were in equity. He was treated fairly throughout; there is no allegation or evidence of fraud, unfair treatment, duress or mistake.

Getting back to the question of an alleged executed oral contract of employment we can do no better than to again call attention to one of the cases cited by counsel for defendant in error, namely, Boggs vs. Pacific Steam Laundry Co. 70 S. W. 818, where the court holds that, such a prior executed oral contract as is now claimed to exist would be nullified by the subsequent written agreement. Although much has been said in counsel's brief, of this new theory, no authorities in point are cited to sustain his contention. He cites two cases only on this point, namely **Mobile, etc. R. Co. vs. Jurey,** 111 U. S. 584, and **P. C. Co. vs. Yukon,** 155 Fed. 29. Both were decided on the ground that the agreement was oral and that the bill of lading was not the contract. In the Mobile case it appeared that the bill of lading **"had never been delivered to the defendants in error, but only to Hall, who was not authorized to receive it."**

In the case of P. C. Co. vs. Yukon the Court said:

> "All of this evidence was admitted for the purpose, **not of modifying the provisions** of the bills of lading, but of showing the intent and purpose of the contracting parties, and aiding the court to construe the bills of lading with reference to that intent."

Counsel further claims in his brief that at no place do we assign or argue or discuss any error in the admission or rejection of testimony. In this connection we call attention to the motion for non-suit which, as was said in the case of Boggs vs. Pac. Steam Laundry Co., supra, raised a question of law for the court to decide. In that case the court said:

> "The fact that such testimony was admitted without objection is of no consequence, for its legal effect after it was admitted was a question of law for the court, and not a question of fact for the jury. * * * * * * *
>
> "The demurrer to the evidence properly raised this question of law, as a demurrer to the petition would have done. The trial court erred, therefore, in refusing to give the peremptory instruction at the close of the plaintiff's case, and that court acted properly when it granted a new trial for that reason, inter alia."
>
> Boggs v. Pac. Steam Laundry Co.
> 70 S. W. 818 at 821.

Counsel for defendant in error has also submitted additional authorities since the argument. These additional authorities are two in number and are as follows:

Hot Springs Ry. Co. v. McMillan 88 S. W. 846, and **Jackson v. Pac. Coast Condensed Milk Co.** (Ore.) 120 Pac. 1.

From the first of these cases (Hot Springs Co. v. McMillan) counsel argues that the release in the case at bar is **void** because there was some proof of a custom to pay injured men half time. There was no such ruling in the case cited. In the **Hot Springs** case, **fraud was pleaded** and the court held that testimony tending to show a custom of the company to continue the wages of disabled employes was admissible under the allegation of the pleadings that **"the alleged release was fraudulent and that when he signed same he did so under the impression that he was signing a receipt for money due."**

We do not dispute that when fraud, duress, mistake or the like is pleaded a different rule obtains. In the case at bar **fraud was not pleaded** nor even suggested until now. Here there is nothing more or less than an attempt to contradict a written release by parol testimony of an entirely different agreement. Furthermore, there was nothing said in the Hot Springs case from which to draw the conclusion that the release was **void.** The court said that:

> "While the testimony of McMillan on the question appears to us to be weak

> and contradictory, yet unless we overturn a long line of decisions of this court, we must hold that all these were matters for the jury to settle, and, as they were properly instructed, their decision is final."

The plaintiff had alleged in his reply that the release set up in the answer had never been signed by him, that he had signed a receipt, that an agent of the defendant had substituted the release.

> "Which he had refused to sign, for the receipt which he had agreed to sign, and which he intended and believed he was signing."

How counsel can, from that decision, reason that the release in the case at bar is **void** is more than we can understand. Parker did not even know, at the time he signed the release, that in making settlements, the company usually paid half time. He testified:

> "A. Well, I never had any—I never had any idea to know what they did settle for. I never had any trouble with the company or never had anything to do with it one way or the other.
> Q. Well had you made inquiries or found out how they had settled with other people?
> A. No, I never.
> Q. Didn't you understand they usually gave a fellow half time when off.

A. No, I didn't know anything about it.

Q. Never heard that?

A. I have since that." (Tr. p. 124)

Parker also read over the release before signing it. He testified:

"Q. You read this over before you signed it, didn't you?

A. Which?

Q. This written statement I have just put in evidence?

A. Yes, sir. (Tr. p. 131)

That Parker was not telling the truth is evidenced by his contradictory statements. As just pointed out, he had testified (Tr. p. 124) that he had never heard of the custom to pay half-time until after he made the settlement. This is directly contradicted by his later testimony, in which he says:

"Q. How did you arrive at that amount, $410.75?

A. He figured up the time I had lost, split my wages in the middle.

Q. Called it half time?

A. Called it half time.

Q. And what did you add to that?

A. Didn't add anything to it.

Q. Didn't add anything to it. They paid the doctor $175?

A. Yes, sir.

Q. They paid that too, did they?

A. They had paid that beforehand."

Evidence of a custom of this kind has been distinctly held to be not admissible to avoid a written release. A case exactly in point is:

Ogden v. Philadelphia & W. C. Traction Co., 52 Atlantic, Rep. 9.

This case was decided by the Supreme Court of Pennsylvania. The plaintiff had been injured and had executed a written release (set forth in full in the opinion) in consideration of $20, and an agreement to pay him $1.50 for each day he was confined to the house. Later on he brought an action, alleging, as does Parker in this case, that the company, at the time he signed the release, orally agreed to **employ him for the rest of his life.** The court held that the fact that the company followed its usual custom of giving the plaintiff light employment at $1.50 per day after he got out of the house was not evidence of a contemporaneous oral agreement to employ him for life; and that the written release could not be avoided by evidence of such alleged contemporaneous parol agreement.

Another point decided in this Pennsylvania case which has not been raised here, because it seems wholly unnecessary to do so, in view of the discussion of the parol evidence rule, is that **any such oral contract as Parker claims is too indefinite to be enforced.**

Concerning this the Pennsylvania court said, (52 Atl. at p. 12):

> "The place he was to fill was not to be determined alone by his judgment or his taste or his whims. There is no

> provision in the alleged oral agreement for determining the precise nature of his employment. No surgeon or examining board was provided to pass upon his physical vigor. Neither he nor the company was named as having the right to determine the character of his employment. The contract was one incapable of enforcement, because of utter want of precision in its terms; and for that reason, as well as for the first one given, a verdict should have been directed for defendant."

The other additional authority cited by counsel for defendant in error (Jackson v. Pac. Coast Condensed Milk Co., 120 Pac. 1) merely holds that where there was a contract of employment containing a provision that 50 cents should be deducted each month for a Hospital Fund, and the employer had no hospital, and did nothing to furnish an injured employe needed medical attention, he was justified in seeking proper medical aid and the company was liable therefor. The court held, however, that **the amount in the hospital fund was the limit of such liability.** In the case at bar there was nothing said of any "hospital fund."

Parker paid a dollar a month for the services of Dr. Dix and was given what he paid for. (Tr. p. 105)

The case of Miller vs. Beaver Hill Coal Co., 48 Ore. 136, 85 Pac. 502, is nearer in point. There it was held that—

"The transaction, therefore, under the testimony, constituted in law nothing more than a subscription by the plaintiff and the other employes, for the charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford. And the only liability assumed by the defendant in collecting the fund was to expend it **for the purpose for which it was subscribed, and no other.** The mere fact that it received or exacted the contribution did not impose upon it the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not. A sick or injured employe was entitled to the use and benefit of the hospital and the medical services there provided, to the extent of the money contributed for that purpose, but he was not obliged to go to the hospital or to accept the accommodations. He could, if he chose, go elsewhere and employ physicians and attendants other than those provided by the company, and, if he did so, the company **would not be liable to reimburse him therefor.** The only duty of the

company was to use ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, and it is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another.

Miller vs. Beaver Hill Coal Co.
48 Ore., 136, 85 Pac. 502.
Citing Union Pac. Ry. Co. vs. Artist.
60 Fed., 365; 9 C. C. A. 14.
and other cases.

Therefore, in the case at bar, there was no liability to pay the $175 to a physician privately employed by Parker.

But what if there was a liability? The intent and purpose of the settlement was, that in consideration of the payment of the sum named, Parker released the company from that liability, and all other liability arising out of the transaction. It might as well be argued in any case where a settlement is made between employer and employe for personal injuries that the settlement is void and without consideration because there was a liability on the part of the employer.

We wish to call the attention of the court to a few additional authorities on the general proposition for which we are contending, namely that a written release in compromise and settlement of unliquidated damages cannot be varied by parol. In a late

Mississippi case the release was in the form of a receipt, and was as follows:

> "New Orleans, La., Aug. 4, 1908. I, the undersigned, William H. English, do hereby acknowledge to have this day received from the New Orleans & Northeastern Railroad Company, the Alabama & Vicksburg Railway Company, and the Alabama Great Southern Railroad Company, the sum of seven thousand dollars ($7.000.00) paid to me in full satisfaction and settlement of all claims of every kind whatsoever that I have or may have against said companies, or either of them, because of the personal injury received by me in Meridian yards on or about the twentieth (20th) day of July, 1907, hereby giving full release, satisfaction and guarantee of every kind whatsoever. Signed in triplicate the 4th day of August, 1908.
>
> Signed) William H. English.
>
> Witness:
> (Signed) H. B. Sargent.
> (Signed) A. G. Tafts."

In an action to recover on an alleged additional oral promise to furnish employment, the court held that such evidence was not admissible, that the instrument was not merely a receipt, as it contained a contract to receive the money named therein "in

full satisfaction and settlement;" and that the stipulation in writing was **contractual** and could not be varied by parol.

English vs. New Orleans & N. E. R. Co. 56 So. 665.

Citing Thompson v. Bryant, 75 Miss. 12; 21 So. 655; Bauer v. Lyons, 72 Miss. 932, 18 So. 428; and Cooke v. Blackburn, 58 Miss, 537.

In a recent Missouri case the paper referred to in the opinion as the "second paper" consisted of an account headed:

> "St. Louis and San Francisco Railroad Company, to C. & A. J. Matthews, Dr."

with this following:

> "In full settlement and satisfaction of all claims whatever kind and description, arising from or growing out of loss or damage to any and all kinds of property up to and including the 18th day of January, 1909, including buildings, corn and hay * * * $800.00."

This account bears the approval and check marks of various officers of the railroad. Following these approvals is this:

> "Received February 8th, 1909, of the St. Louis and San Francisco Railroad Company, eight hundred 00-100 dollars in full payment, release and discharge of above claim.
>
> (Signed) C. and A. J. Matthews."

Regarding this document, the court said:

"We are unable to agree that this second paper referred to as having been introduced is a mere receipt. By its very terms, and as plain as language can make it, it is a contract, a release and discharge of all claims for damages and cannot be considered in any other light. It follows from this that parol evidence or evidence aliumde the paper itself can not be introduced to explain the meaning of its terms, unless the words used, that is to say, the words, 'including buildings, corn and hay' are latent ambiguities. If there is any latent ambiguity about these words in this release they are subject to the consideration of a jury or the court as a trier of fact and may be explained by parol evidence. It is useless to endeavor to invoke the doctrine applicable to latent ambiguities as applicable to these words, or to contend that these terms used are ambiguous. There is no ambiguity, latent or patent, in this instrument. It is plain and unmistakable in terms and not only needs no construction or interpretation but interprets itself."

The court held that parol evidence was inadmissible to vary the terms of this writing.

Matthews vs. Phoenix Ins. Co. 140 S. W. 968.

We are not surprised at counsel's failure to submit any cases in point on the question of evidence involved herein, except the case of Pennsylvania Co. vs. Dolan, for the reason that, we are convinced, there are no other cases. That case stands alone and the case at bar is readily distinguishable even from that case by reason of the agreement as to the consideration being the **sole consideration.** In our main brief, at p. 19, we have submitted the case of Budro vs. Burgess, 83 N. E. 318, as an authority construing this term. In conclusion we desire to submit one more authority on this point, namely the case of

Hurr vs. Metropolitan St. Ry. Co. (Mo.) 124 S. W. 1057.

The release, in its essential parts, was as follows:

> "Know all men by these presents, that we * * * **for the sole consideration** of four hundred and 0-100 dollars to us paid by the Metropolitan Street Railway Company, the receipt of which is hereby acknowledged, do hereby release and forever discharge" (here follows description of accident, injuries, etc.) "It is expressly understood and agreed that said sum of four hundred and 0-100 **is the sole consideration** of this release, and the consideration stated herein is contractual, and not a mere

> recital; and all agreements and understandings between the parties are embodied and expressed herein."

It will be noted that the latter part of this release contained no "promise" such as seems to be required under the rule in Pennsylvania Co. v. Dolan. It is a mere statement of **the legal effect** of the first part of the instrument, which is almost identical with the instrument in the case at bar. The court said:

> "It is not claimed that this compromise was tainted with any kind of fraud. By the express terms of the written contract, the consideration of $400.00 paid to plaintiff is made to release and satisfy the entire cause of action, and is agreed to be contractual. Certainly plaintiff will not be heard to attack or in any manner to impugn this contract * * * We hold, however, that oral testimony is wholly incompetent to contradict or vary the terms of the written contract which, as we have stated, treats the consideration as a contractual subject, and not a mere recital."

Certainly the mere statement in the release that the consideration is contractual does not of itself make it so. Except for this statement the release

is no stronger or better than the one in the case at bar. Both use the words, "sole consideration."

The judgment should be reversed.

Respectfully submitted,

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